

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported but appears at R. ; the opinion of the Circuit Court of Appeals is reported in 133 F. (2d) 894.

JURISDICTION.

The opinion of the Circuit Court of Appeals was entered on February 17, 1943. Within the time permitted by the rules of the Circuit Court of Appeals for the Third Circuit, the Petitioner duly filed a petition for rehearing which was denied on March 17, 1943. The judgment of the Circuit Court of Appeals was entered March 26, 1943. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, 28 U. S. Code § 347 (a) as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The summary statement of the facts is given in the petition, pp. 2, 3, above.

STATUTES INVOLVED.

The applicable provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are the following:

“SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * *

(c) *Taxes Generally*.—Taxes paid or accrued within the taxable year, except—

* * *

(2) income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possessions of the United States; but this deduction shall be allowed in the case of a taxpayer who does not signify in his return his desire to have to any extent the benefits of section 131 (relating to credit for taxes of foreign countries and possessions of the United States);

* * *

SEC. 31. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax, to the extent provided in section 131.

SEC. 131. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

(a) *Allowance of Credit*.—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this title shall be credited with:

(1) *Citizen and Domestic Corporation*.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and * * *,

The provisions of the Quebec Mining Act, R. S. (1909), 2098, are as follows:

QUEBEC MINING ACT R. S. (1909), 2098.**“Division I****DECLARATORY AND INTERPRETATIVE**

3. In this act, as well as in all orders-in-council or regulations promulgated in virtue thereof, unless the context or subject-matter otherwise requires:

* * *

16. The word ‘output’ includes the mineral-bearing substances coming from the mine such as those sold, removed or placed upon the market, including therein those treated or partially treated at any smelter or mill forming part of the works.

17. The words ‘gross value of the year’s output’ mean the real value of the ore and minerals at the ruling market prices at the time of their sale or of their use, and, in case of doubt, the representatives of the Department of Colonization, Mines and Fisheries may themselves make an estimate of the value of the ores or minerals sold, utilized or shipped by the operators, and such estimate shall be final to establish the gross value . . .

* * *

Division III**DUTIES ON MINES**

11. There shall be paid to the Crown, at the time and in the manner hereinafter provided, the duties imposed by this division. * * * R. S. (1909), 2105, 15 Geo. V, Ch. 37, section 2.

12. 1. From and after the first of January, 1935, every mine in the Province of Quebec shall be liable for, and the owner, manager, holder, lessee, occupant, or operator of the mine shall pay, the following duties:

a. Upon annual profits in excess of \$10,000.00 up to \$1,000,000. . . 4%; * * * R. S. (1909), 2105a; 15 Geo. V, Ch. 37, Section 2.

13. The annual profits shall be ascertained and fixed in the following manner:

From the gross value of the year's output, sold, utilized or shipped during the year there shall be deducted the costs of operation and expenses incurred during the year in question, to wit:

1. The cost of transportation of the output of the mine, if such cost is borne by the operator, owner, occupant or lessee;
2. The working expenses of the mine, including the salaries and the wages of the workmen and employees of the mine, mills and plant, but exclusive of other salaries or wages;
3. The cost of the necessary power and light for the operation of the mine, mills and plant;
4. The cost of explosives, fuel and any other supplies used in the mining operations and in the treatment of the minerals by the operator;
5. The cost of insurance upon the equipment, the buildings at the mine and the stock in storage;
6. An annual amount, based upon the probable annual average cost of repairs and renewals necessary to maintain operations in a condition of efficiency, to cover the depreciation due to ordinary wear and tear of the buildings and equipment, provided, however, that such amount shall not exceed fifteen per cent of the value of same at the commencement of the year, as appraised by an assessor appointed by the Minister;
7. The cost of work performed during the year in sinking shafts, making excavations and workings and trenching, in or upon the mining property, with a view to opening up or testing for minerals. R. S. (1909), 2105b, 15 Geo. V, Ch. 37, section 2.

14. No allowance or deduction shall be made for the cost of new installations or new buildings made or erected during the year, nor for depreciation in the value of the mine, by reason of exhaustion or partial exhaustion of minerals, due to the mining thereof. R. S. (1909), 2105c; 15 Geo. V, Ch. 37, Section 2."

ARGUMENT.

The Circuit Court of Appeals, in deciding whether the Quebec Mining Tax was an income tax, applied the doctrine that income can only be realized if there is something severed from capital following its interpretation of this Court's decision in *Eisner v. Macomber*, 252 U. S. 189. That the concept of income in the United States is limited to a doctrine of severance was expressly repudiated by this Court in *Helvering v. Griffiths*, decided on March 1, 1943, in which Mr. Justice Jackson, writing the opinion for this Court, in speaking of the change in the Treasury Department's Regulations with regard to the taxation of stock dividends states:

“This action followed the decision of this Court in *Helvering v. Bruun*, 309 U. S. 461, on March 25, 1940, which rejected the concept that taxable gain could arise only when the taxpayer was able to sever increment from his original capital. It preceded by ten days the decision in *Helvering v. Horst*, 311 U. S. 112, which held that there was no exemption from taxation where economic gain is enjoyed ‘by some event other than the taxpayer’s personal receipt of property or money.’ *Id.* at 116. Each of these decisions undermined further the original theoretical bases of the decision in *Eisner v. Macomber*.”

Mr. Justice Douglas, writing the dissenting opinion in the *Griffiths* case in which Justices Black and Murphy concurred, also points out that the definition of income as set forth in *Eisner v. Macomber* is too restricted and will not stand analysis in view of the Court's later decisions. Thus, Mr. Justice Douglas says:

“The notion that there can be no ‘income’ to the stockholders in such a case within the meaning of the Sixteenth Amendment unless the gain is ‘severed from’

capital and made available to the recipient for his 'separate use, benefit and disposal' (*Eisner v. Macomber*, 252 U. S. pp. 207, 211) will not stand analysis. In cases like *Koshland v. Helvering* and *Helvering v. Gowran* where stock dividends were held to be taxable as income, both the original investment and the accumulations were retained by the company. Yet those cases hold that stockholders may receive 'income' from the operations of their corporation though the corporation makes no distribution of assets to them. And see *United States v. Phellis*, 257 U. S. 156; *Rockefeller v. United States*, 257 U. S. 176; *Cullinan v. Walker*, 262 U. S. 134; *Marr v. United States*, 268 U. S. 536. Other cases make plain that there may be 'income' though neither money nor property has been received by the taxpayer. Benefits accruing as the result of the discharge of the taxpayer's indebtedness or obligations constitute familiar examples. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716; *Douglas v. Willcuts*, 296 U. S. 1; *United States v. Handler*, 303 U. S. 564. And increase in the value of property as a result of improvements made by the lessee are taxable income to the lessor even though the taxpayer could not 'sever the improvement begetting the gain from his original capital.' "

The Circuit Court of Appeals held that, since the Quebec Mining Tax applied to the gross value of the year's output which was utilized or shipped during the year, as well as to the year's output which was sold, it was not a tax on income because there had been no realization of income insofar as minerals utilized or shipped. That decision is contrary to this Court's opinion in the Griffiths case, *supra*, and to other decisions of this Court.¹

¹ Income has been found in a discharge of the taxpayer's indebtedness, *United States v. Kirby Lumber Co.*, 284 U. S. 1; in the payment of premiums on policies of insur-

The effect of the requirement that the value of minerals placed on the market be included in profits is merely to relate the deductions allowed a mining company during the year to the value of the minerals produced in that year. The work to produce certain minerals is carried on in one year even though the minerals are not sold and the Quebec statute merely provides that for the mining company to secure the benefit of those deductions the value of the minerals taken from the mine must be included in its profits for that year. The United States income tax contains similar provisions. Thus, the Revenue Act of 1921 provided that an Insurance Company could not take a deduction for depreciation, taxes and other expenses relating to real estate owned by the Insurance Company unless it included in its gross income the rental value of the space occupied by the Company. This Court sustained the validity of this provision in *Helvering v. Independent Life Insurance Co.*, 292 U. S. 371. Likewise, the Commissioner's Regulations under the Revenue Act of 1936 and subsequent Revenue Acts, provide that in the case of a taxpayer doing work

ancee on the taxpayer's life by securities placed in trust by the taxpayer, although in such a case the only gain to the taxpayer is in seeing his family provided for, *Burnet v. Wells*, 289 U. S. 670; in the payment of debts or in payments to a divorced wife or for the support of children by means of a trust created by the taxpayer: *Helvering v. Blumenthal*, 296 U. S. 552; *Douglas v. Willcuts*, 296 U. S. 1; *Helvering v. Schweitzer*, 296 U. S. 551; in benefiting one's family through the retained control of income, *Helvering v. Clifford*, 309 U. S. 331; at death in uncompleted services, *Helvering v. Estate of Enright*, 312 U. S. 636; in the taxpayer's satisfaction in making a gift, *Helvering v. Horst*, 311 U. S. 112; in the termination of a lease on the taxpayer's own property where the tenant had erected a building during the term of the lease, *Helvering v. Bruun*, 309 U. S. 461.

under a contract which takes more than one year, the taxpayer may report each year a percentage of the gross income based upon percentage of completion of the contract whether any money is received by the taxpayer in that year or not and if income is so reported, all of that year's expenditures must be deducted in that year.

The Quebec Mining Act, by providing for the inclusion in annual profits of the value of minerals placed upon the market, merely follows the provision set forth above regarding insurance companies and the method of taxing long term contracts. The Quebec Mining Act really provides for a tax upon annual income by placing the value of the minerals obtained and the cost of obtaining them in the same year.

Income for the purpose of the income tax in the United States is determined upon the method of accounting regularly employed by the taxpayer. The Quebec Mining Act provides a method of keeping the taxpayer's books so as clearly to reflect the taxpayer's income on an annual basis. Such a provision is not foreign to the concept of income under the laws of the United States. Thus, Article 21-1 of Regulations 94, applicable to the Revenue Act of 1936, provides:

“Although taxable net income is a statutory conception, it follows, subject to certain modifications as to exemptions and as to deductions for partial losses in some cases, the lines of commercial usage. Subject to these modifications *statutory net income is commercial net income. This appears from the fact that ordinarily it is to be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer.*” (Italics supplied.)

No particular method of accounting fixes net income in one case and not in another, but the Federal income tax is on net income computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer.

The Circuit Court of Appeals also held that the Quebec Mining Tax was not an income tax because the deductions were limited to deductions in connection with the cost of mining operations. The question of deductions is really immaterial in deciding whether a tax is an income tax in the United States because income taxes may be placed upon gross income. Thus the 5% Victory Tax imposed by sub-chapter D as added by Section 172 of the Revenue Act of 1942, and the United States payroll tax on employees imposed by Chapter 9 of the Internal Revenue Code are taxes on gross income from which no deductions are allowed. Thus, the allowance of deductions is immaterial in deciding whether a tax is an income tax. As this Court has said, deductions are a matter of legislative grace. *New Colonial Ice Company, Inc. v. Helvering*, 292 U. S. 435.

The Quebec Mining Tax is a tax on income and a tax which may be credited against income taxes due the United States under Section 131 of the Revenue Act of 1936. The Bureau of Internal Revenue and the Board of Tax Appeals have decided many times whether particular foreign taxes constitute income taxes, but the question as to what criteria of income taxation must be used and how exactly the foreign tax must conform to the Internal Revenue Code in order to be an income tax subject to credit has never been decided by this Court. Thus the following taxes have been held to be income taxes:

Foreign Country or Possession	Tax	Citation
Argentine . . .	Dividend tax, paid by company, allowable as a credit to shareholders	I. T. 2762; (1934) C. B. XIII-1, 64
Australia . . .	Special property tax on dividends	I. T. 3201; C. B. 1938-2, 196
Bolivia	Tax in proportion to ratio of profits to capital invested in mining companies	I. T. 2070; (1924) C. B. III-2, 250
Brazil	Tax computed under optional method as a percentage of corporate gross profit	G. C. M. 800; (1926) C. B. V-2, 75
	4 per cent income tax under Art. 174. Income Tax Regulations modified to June 20, 1932	I. T. 3313; C. B. 1939-2, 171
Canada	5 per cent tax for copyright use deducted from payments to non-residents (Chap. 40, Income War Tax Act, assented to June 28, 1935)	I. T. 2964; (1936) C. B. XV-1, 138
	Ontario and Quebec tax on net revenue under Section 3a of the Corporations Tax Act	G. C. M. 18182; C. B. 1937-1, 149
	Tax withheld from royalties and paid by Canadian agent	<i>Crawford Music Corp.</i> , 40 B. T. A. 284 (A)

Foreign Country or Possession	Tax	Citation
Chile	Corporate tax on in- come under Decree- law No. 225, dated February 17, 1927	G. C. M. 6042; (1929) C. B. VIII- 1, 184
Cuba	8 per cent tax on profits of corporations with a "share capital." Law effective Janu- ary 29, 1927	G. C. M. 7629; (1930) C. B. IX- 1, 146
	8 per cent on organiza- tions for cultivation and exploitation of tobacco and sugar. Act of July 31, 1917	I. T. 1522; (1922) C. B. I-2, 199
	Havana tax on profits from gas and electric light plants	<i>Havana Elec. Ry.</i> <i>Lt. & Pwr. Co.,</i> 34 B. T. A. 782 (A)
	Tax on gross income from freight and pas- sengers shipped in national ports, im- posed by article XV of Cuban law of July 6, 1928	<i>Seatrain Lines,</i> <i>Inc.,</i> 46 B. T. A. 1076 (NA)
Ecuador	Corporation tax im- posed by Title III, Article 14 of 1928 Law	I. T. 2445; (1929) C. B. VIII-1, 102
Great Britain	Tax deducted from copyright royalties and paid by British agent	<i>Crawford Music</i> <i>Corp.,</i> 40 B. T. A. 284 (A)

Foreign Country or Possession	Tax	Citation
	National defense contribution under section 19, part III of the British Finance Act, 1937	I. T. 3171; C. B. 1938-1, 192
	War loan taxes withheld from interest paid on war bonds	<i>Columbian Carbon Co.</i> , 25 B. T. A. 456 (A)
Guatemala . . .	Tax upon profits or net earnings of business enterprises	I. T. 3500; C. B. 1941-2, 138
Italy	"Richezza Mobile," tax on income from personal property	S. M. 3982; (1925) C. B. IV-2, 204
Mexico	Absenteeism tax effective March 1, 1934 at rate of 2 and 4 percent on income of persons absent from Mexico	G. C. M. 14625; C. B. XIV-1, 114
	Assessment on receipts approved July 31, 1931; taxes imposed under Sections IV and V (a) of Article 1 on sales or transfers of concessions, and on wages, salaries and other remuneration; taxes imposed by Section II of Article 1 on interest or rent receipts	I. T. 2620; (1932) C. B. XI-1, 44

Foreign Country or Possession	Tax	Citation
	5 per cent tax on interest under article 20 of the Mexican law "Ley del Impuesto sobre la Renta"	I. T. 3385; C. B. 1940-1, 103
	Tax under "Law of Taxation on Excess Profits"	I. T. 3381; C. B. 1940-1, 57
	Tax on associations and enterprises effective March 1, 1924	I. T. 2188; (1925) C. B. IV-2, 82
Netherlands	"Wet op de dividend- en tantiemebelasting" on dividends	I. T. 3371; C. B. 1940-1, 102
Panama	"Fondo Obrero," an income tax	I. T. 3245; C. B. 1939-1, 112
Peru	7 per cent tax and 1 per cent tax imposed by decrees of February 17, 1936	I. T. 3223; C. B. 1938-2, 179
Puerto Rico	Income from sales of tobacco imposed by section 9 of Act #43, approved July 1, 1921	I. T. 2118; (1924) C. B. III-2, 251
Virgin Islands	Income tax	I. T. 2946; (1935) C. B. XIV-2, 109.

On the other hand, the following taxes have been held not to be income taxes:

Foreign Country or Possession	Tax	Citation
Canada	1 per cent tax on net insurance premiums	I. T. 3138, C. B. 1937-2, 230; <i>Helvering v. Queen Ins. Co.</i> , 115 F. (2d) 341, cert. den. 312 U. S. 706
	Nova Scotia, Quebec, Ontario, Saskatchewan, Alberta and Manitoba provincial taxes on gross insurance premiums	I. T. 3211; C. B. 1938-2, 177
Cuba	Tax on gross revenue under Article XV of law approved July 9, 1928	I. T. 2596; (1931) C. B. X-2, 184
	Bag tax on corporate sugar plantations	O. D. 372; (1920) C. B. 2, 115
	Tax on percentage of sales, exchanges or assignments, gross receipts, and on purchase of merchandise from abroad imposed by the Cuban law of October 9, 1922, as amended July 15, 1925, January 27, 1927, decree laws No. 393, November 8, 1935, and No. 695, March 3, 1940.	I. T. 3429; C. B. 1940-2, 136

Foreign Country or Possession	Tax	Citation
	Tax imposed on commercial value of the product at the mouth of the well, minus cost of transportation, imposed by Articles XXII and XXIII of Chapter VI of the mineral fuel law effective January 1, 1939	I. T. 3433, C. B. 1940-2, 137
France	Turnover tax, law of June 25, 1920	<i>Eitingon-Schild Co.</i> , 21 B. T. A. 1163 (A)
	"Chiffre d'affaires"	G. C. M. 8478; (1930) C. B. IX-2, 224
Great Britain. I n c o m e	tax withheld from royalties on patents	<i>Trico Products Corp.</i> , 46 B. T. A. 346, on appeal
Italy	Property or inheritance taxes described as "famiglia," "esercizio," "vettture e dom," "cani," "imposta patrimonio," "terreni," "fabbri-cati" or "assicurazione agricola"	S. M. 3982; (1925) C. B. IV-2, 204
Mexico	Tax on receipts from commerce, industry and agriculture under section 1 of Article 1 of law approved July 31, 1931	I. T. 2620; (1932) C. B. XI-1, 44

Foreign Country or Possession	Tax	Citation
	"Ley del Impuesto so- bre la Renta" on ex- ports to Mexico under Article 14 of Mexican decree signed August 30, 1937, effective September 15, 1937	I. T. 3193; C. B. 1938-1, 193
	5 per cent tax on gross revenue of film dis- tributors	I. T. 3288; C. B. 1939-1, 139
	Tax on exportation of capital effective Au- gust 31, 1936	I. T. 3040; C. B. 1937-1, 109
	Proportionate rate tax of 10 per cent on oil production participa- tions	I. T. 3320; C. B. 1939-2, 191
New Zealand.	Film-hire tax on re- ceipts from renting sound-picture films imposed under part V of 1930 finance act	G. C. M. 11039; (1932) C. B. XI- 2, 118
Peru	Sugar export tax paid in 1918 and 1919 un- der laws 2143 and 2727	I. T. 2499; (1929) C. B. VIII-2, 325
Philippine Islands	Privilege tax on value of goods exported to United States	<i>Mallouk</i> , 34 B. T. A. 269.

To arrive at a correct determination as to whether the foregoing taxes are or are not income taxes entitled to be credited in the United States, this Court should decide how exactly these taxes must conform to the Internal Revenue Code in order to be used as a credit.

CONCLUSION.

This case involves matters of novel impression which should be reviewed by this Court and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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Dated: Philadelphia, Pennsylvania,
June 15, 1943.